

STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v.

MARK DAVID SESSIONS,

Defendant-Appellant.

C.A. 251836 Gm 5/18/04
LIVINGSTON COUNTY CIRCUIT COURT
CASE NO. 03-13545-AR

D. Burns,
~~LIVINGSTON COUNTY DISTRICT~~
~~COURT CASE NO. 03-0293-FY~~

SUPREME COURT DOCKET NO.

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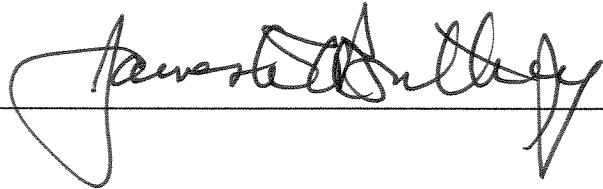
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DEFENDANT-APPELLANT'S APPLICATION FOR LEAVE TO APPEAL
ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

INDEX	4
STATEMENT	6
QUESTION	7
FACTS	8
STANDARD	10
ORDER APPEALED FROM.	11
GROUND S	12
ARGUMENT.....	13
1. Does successful completion of all conditions of probation include a person who has been successfully discharged from probation, under Michigan's felon in possession of a firearm statute, MCL 750.224f, that requires that a convicted person successfully complete probation, when a person had a probation violation; where probation was continued; where a petition for discharge from probation states that the person has completed the conditions of probation; and where a judge finds the same and orders a probation discharge on the aforementioned petition.	12
A. The requirement of successful completion of all conditions of probation includes a person who has been successfully discharged from probation on a petition because all of the objectives of probation have been completed	12
B. Successful completion of probation means that a discharge is achieved because the parolee has faithfully performed all of the objectives of the probation order.	15
C. The Felon in Possession of a Firearm statute focuses on the criminal status of the possessor of a firearm.	17
D. Defendant's successful discharge from probation satisfies the successful completion requirement in the Felon in Possession of a Firearm statute.	18
2. Under Michigan's felon in possession of a firearm statute, which prohibits a person convicted of a felony to possess a firearm unless the person "successfully completes all terms and conditions" of probation, are the words "successful" and "completed" vague and	

ambiguous, when the defendant was discharged from probation based on a petition that states the person has complied with the terms of probation; the defendant demonstrates a willingness to follow the statute by waiting the requisite number of years; and members of the court of appeals disagree with the meaning of the statute.19

CONCLUSION.....22

RELIEF REQUESTED23

INDEX OF AUTHORITIES

CASES

<i>People v Bobek</i> , 217 Mich App 524, 553 NW2d 18 (1996)	13
<i>Roberts v Mecosta Co Gen Hosp</i> , 466 Mich 642; 642 NW2d 663 (2002).	13, 17
<i>Robertson v DaimlerChrysler Corp</i> , 465 Mich 732; 641 NW2d 567 (2002)	9
<i>City of Monroe v Jones</i> , 259 Mich App 443, 674 NW2d 703 (2003).	13, 17
<i>Glennon v State Employees' Retirement Board</i> , 259 Mich App 476, 674 NW2d 728 (2003) . . .	14
<i>People v Boomer</i> , 250 Mich App 534, 655 NW2d 255 (2002)	14
<i>People v Dillard</i> , 246 Mich App 163, 631 NW2d 755 (2001).	18
<i>Jennings v Southwood</i> , 446 Mich 125, 521 NW2d 230 (1994)	17
<i>People v Gilbert</i> , 414 Mich App 191, 324 NW2d 834 (1982)	23
<i>People v Parker</i> , 230 Mich App 677, 584 NW2d 753 (1998)	17
<i>People v Sands</i> , 26 Mich App 158, 680 NW2d 500 (2004)	20, 22
<i>People v Sessions</i> , ___ NW2d ___, 2004 WL 1103068 (May 18, 2004 Mich App)	11, 14
<i>People v Swint</i> , 225 Mich App 656; 562 NW2d 272 (1997)	18
<i>Shorecrest Lanes & Lounge v Liquor Control Comm'n</i> , 252 Mich App 456, 652 NW2d 493 (2002)	10
<i>People v Tombs</i> , 260 Mich App 201, 679 NW2d 77 (2003)	20
<i>Wayne Co Prosecutor v Dep't of Corrections</i> , 242 Mich App 148, 617 NW2d 921 (2000) .	19, 20

STATUTES

MCL 750.224	13
MCL 791.242	20
MCL 771.5	16

SECONDARY AUTHORITIES

Merriam-Webster’s Collegiate Dictionary (2002). 17, 21

Webster’s Revised Unabridged Dictionary (2002) 21

LAW REVIEW ARTICLE

Joshua R. DeGonia, *Defining a Successful Completion of Probation Under California’s
Expungement Statute*, 24 WHITTIER L. REV 1077, 1091 (2003)18

STATEMENT OF JURISDICTION

This Court has jurisdiction to hear this case under MCR 7.301(A)(2), which grants jurisdiction “to review by appeal a case . . . after decision by the court of appeals.” MCR 7.302(C)(2) provides that an appeal from a criminal matter must be taken within 56 days of the date of the court of appeals’ decision. The court of appeals issued a decision in this case on May 18, 2004. The 56 days have not yet run.

STATEMENT OF QUESTIONS INVOLVED

1. Does “successful completion of all conditions of probation” include a person who has been successfully discharged from probation, as required for a person convicted of a felony under Michigan’s Felon in Possession of a Firearm statute, MCL 750.224f, when a person convicted of a felony had a probation violation; where probation was continued; where a petition for discharge from probation states that the person has complied with the conditions of probation; and where a judge finds the same and orders a probation discharge on the aforementioned petition?

The district court answered: Yes.

The circuit court answered: Yes.

The court of appeals answered: No.

The Appellant answers: Yes.

The Appellee answers: No.

2. Under Michigan’s felon in possession of a firearm statute, which prohibits a person convicted of a felony to possess a firearm unless the person “successfully completes all terms and conditions” of probation, are the words “successful” and “completed” vague and ambiguous, when the defendant was discharged from probation based on a petition that states the person has complied with the terms of probation; the defendant demonstrates a willingness to follow the statute by waiting the requisite number of years; and members of the court of appeals disagree with the meaning of the statute.

The Appellant answers: Yes.

The Appellee answers: No.

STATEMENT OF FACTS

The facts are uncontested and were stipulated to at the preliminary examination. In our response to the Plaintiff-Appellee's appeal, the statement of facts were uncontested. Therefore, for continuity, we rely and present, in substantive whole, those facts.

Defendant was found in possession of a firearm on February 9, 2003, and was charged with Felon in Possession of a Firearm, contrary to MCL 750.224f, and Domestic Violence, contrary to MCL 750.81. The Felon in Possession charge was predicated on Defendant's March 19, 1993 guilty plea to three separate felony charges of Breaking and Entering a Building With Intent to Commit Larceny, contrary to MCL 750.110. He was subsequently placed on a three year probationary term. On March 3, 1995, Defendant pled guilty to violating his probation and was continued on probation. *See* Preliminary Examination Transcript, Ex 1. Ultimately, Defendant was discharged from probation on April 23, 1996. Ex 2. In the petition requesting the discharge, the probation officer included the sentence: "Defendant has complied with the [*sic*] terms and conditions of probation." *See id.*

The Felon in Possession statute states:

Except as provided in subsection (2), a person convicted of a felony shall not possess, use, transport, sell, purchase, carry, ship, receive, or distribute a firearm in this state until the expiration of 3 years after all of the following circumstances exist:

- (a) The person has paid all fines imposed for the violation.
- (b) The person has served all terms of imprisonment imposed for the violation.
- (c) The person successfully completed all conditions of probation or parole imposed for the violation. MCL 750.224f(1).

Accordingly, unless a convicted felon has complied with all three requirements, he is ineligible to possess a firearm. The only issue was whether Defendant had “successfully completed all conditions of probation.” MCL 750.224f(1)(c).

STANDARD OF REVIEW

This matter involves statutory interpretation, which is a question of law. Questions of law are reviewed under a *de novo* standard of review. *Shorecrest Lanes & Lounge, Inc v Liquor Control Comm'n*, 252 Mich App 456, 460; 652 NW2d 493 (2002).

ORDER APPEALED FROM

Defendant-Appellant appeals from the Opinion of the Court of Appeals. *People v Sessions*, ___ NW2d ___, 2004 WL 1103068 (Mich App May 18, 2004).

GROUND FOR APPEAL

The 2-1 published Opinion of the Court of Appeals is clearly erroneous, as it fails to accord statutory language its ordinary English meaning.

The decision will cause material injustice to thousands of citizens who have long ago been successfully discharged from probation or parole, and who rightly believed they may legally possess a firearm.

ARGUMENT

1. Does successful completion of all conditions of probation include a person who has been discharged from probation, as required for a conviction under Michigan's Felon in Possession of a Firearm statute, when a person had a probation violation; where probation was continued; where a petition for discharge from probation states that the person has complied with the conditions of probation; and where a judge finds the same and orders a probation discharge on the aforementioned petition?

A. The requirement of successful completion of all conditions of probation includes a person who has been discharged from probation on a petition because all the objectives of probation have been completed.

The section at issue of the Felon in Possession of a Firearm statute prohibits the possession of firearms by a person who has been convicted of a felony for a period of three years. After three years and, at issue in this case, when the person has paid all fines and "successfully completed all conditions of probation or parole imposed for the violation" a person convicted of a felony is eligible to possess firearms. MCL 750.224f(1)(c). The issue of "successful completion of all conditions" of probation, in relation to MCL 750.224f(1), appears to be one of first impression in Michigan. Since this Court will be interpreting a statute, a *de novo* standard applies. *People v Bobek*, 217 Mich App 524, 553 NW2d 18 (1996).

It is well established that when a court interprets a statute it is to give an interpretation that is consistent with the intent of the Legislature. *City of Monroe v Jones*, 259 Mich App 443, 674 NW2d 703 (2003) (quoting *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57; 642 NW2d 663 (2002)). A court should start its interpretation by looking at the words of the statute. *Id.* When a statute is clear and unambiguous, a court should enforce the statute as it is written and find the

statute's meaning from the plain meaning of each and every word. *Id.* Unless the words or phrases are defined by the statute, the words or phrases should be given their plain and ordinary meaning. *Glennon v State Employees' Retirement Board*, 259 Mich App 476, 674 NW2d 728 (2003) (quoting *Roberston v DaimlerChrysler Corp*, 465 Mich 732; 641 NW2d 567 (2002)).

Here, Appellant was charged with a count of Felon in Possession of a Firearm. The People argued at the Preliminary Examination that even though Appellant was discharged from probation, he was properly charged with Felon in Possession of a Firearm. The People's argument at the Preliminary Examination, and in their appeal of the district court's dismissal of the charge, is that the statute requires a successful completion of all conditions of probation. And, the People asserted, pleading guilty to a violation of probation eliminates the possibility of successful completion of all conditions of probation. Ex. 1, at 7.

At the Preliminary Examination, Appellant submitted a copy of the discharge of probation as Exhibit "A." *Id.* at 4. Appellant argued that the Felon in Possession of a Firearm charge should be dismissed because Appellant had successfully completed all conditions of his probation per his successful discharge. *Id.* at 7. The district court immediately dismissed the charge. *Id.* at 8. The People requested leave to appeal with the circuit court, and it granted the motion. The circuit court upheld the district court's decision to dismiss the charges. Ex. 3.

The court of appeals heard this case on an interlocutory basis. The court of appeals reversed and remanded this case to the circuit court. In its opinion, the court held that "‘successfully completed all conditions of probation’ requires success in *all conditions* imposed for probation." *People v Sessions*, ___ NW2d ___, 2004 WL 1103068 (Mich App May 18, 2004); Ex. 4. Furthermore, the court stated that it is possible to give every word in the statute

“meaning,” and the statute is straightforward and clear. However, as Judge Bandstra noted in his dissenting opinion, “the statute is not ‘clear’ or ‘straightforward’ as the majority suggests.” *Id.* at 3.

In its opinion, the court of appeals spent an inordinate amount of time on the underlying facts of case that were stipulated to for purposes of the Preliminary Examination only, specifically Appellant’s charge of domestic violence. It certainly has no relevance to the legal issue before it or this Court. However, the court of appeals seems to have clutched to these events in order to create a result-oriented decision. In fact, it becomes more apparent when the court states in its opinion that “[d]efendant’s earlier violation of the conditions of probation and his present pending charge of domestic violence strongly suggest a felon who has disregard for ordered society and who poses a threat to public safety.” *Id.* Appellant requests that this Court look beyond the underlying “facts” of this case and take a detailed look at the actual language of the statute: *successful completion* is not the same as *perfect compliance*.

Appellant respectfully submits that the People’s argument in its court of appeals brief was illogical. The People argued before the court of appeals that the language in the Felon in Possession of a Firearm statute, specifically “successful completion,” is “clear and unambiguous.” However, the problem with the People’s argument stems from the assertion that a violation of probation makes it impossible for a defendant to successfully complete all conditions of probation. The People submitted that the statute contains an inflexible standard that a person convicted of a felony and subsequently placed on probation can have no violations of probation to “successfully complete all conditions of probation.” The court of appeals agreed,

and this interpretation is inconsistent with the plain language of the statute. The statute calls for completion and not compliance.¹

A probationer is discharged based on a court's determination using a probation officer's report of the probationer's conduct. Michigan law provides that a probation officer must submit a report to the court based on the probationer's conduct during the probation period. Based on this report, a court may discharge the probationer. MCL 771.5. A court may also extend probation, so long as the maximum probation period is not exceeded. A court has the authority to base a decision of early termination of probation on the probation officer's report. The probation officer's report of the probationer's conduct plays a larger role than the People asserted to the court of appeals. The probation officer's report indicates whether the probationer has fulfilled the objectives of probation and, therefore, successfully completed all conditions of probation.

In this case, the probation period was at its maximum: three years. In this three year period, Appellant did have a probation violation; however, the probation officer's report discusses the Appellant's conduct during the three-year period. The probation officer's report indicates that the Appellant satisfied the objectives of the probation and even states that Appellant has "complied with the conditions of probation." When determining whether a probationer has "successfully" completed all conditions of probation, a court should, and does, look at the probation officer's report of the probationer's conduct.

¹ This was also noted by Judge Bandstra in his dissenting opinion: "Most notably the majority's interpretation seems to read the statute's 'completed' as if it said 'complied with' instead." *People v Sessions*, ___ NW2d ___, 2004 WL 1103068 (Mich App May 18, 2004).

B. Successful completion of probation means that a discharge is granted because the parolee has faithfully performed all of the objectives of the probation order.

This appeal focuses on the phrase “successful completion.” The process of statutory interpretation by courts is unequivocal. It is well established that when a court interprets a statute it is to give an interpretation that is consistent with the intent of the Legislature. *City of Monroe v Jones*, No. 241486, slip op. at 2 (Court of Appeals, Nov. 18, 2003) (quoting *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57; 642 NW2d 663 (2002)). A court should start its interpretation by looking at the words of the statute. *Id.* When a statute is clear and unambiguous, a court should enforce the statute as it is written and find the statute’s meaning from the plain meaning of each and every word. *Id.*; *People v Parker*, 230 Mich App 677, 685-686, 584 NW2d 753 (1998) (citation omitted). The Felon in Possession of a Firearm statute does not define the term “successful.” A court should first look at the term’s common and ordinary usage. Using a dictionary to define a term is appropriate under these circumstances. *Jennings v Southwood*, 446 Mich 125, 521 NW2d 230 (1994).

The term *successful* means gaining or having gained success. *Merriam-Webster’s Collegiate Dictionary* (2002). Moreover, *success* means one that succeeds. *See id.* Last, the term *succeeds* means (1) to turn out well, or (2) to attain a desired object or end. *See id.* It goes without saying that for probation to turn out well, the desired object or end of probation is a final order of discharge based on a probationer’s completion of the objectives of probation.

Although only persuasive, a law review article discussing approaches for determining successful completion of probation in respect to California’s expungement statute should be observed by this Court:

(1) A high school student who was previously suspended, but thereafter completed his high school education, we would say that he successfully completed his high school education, and we would not suggest that the prior suspension resulted in an unsuccessful completion.

(2) A defendant who has missed a scheduled counseling session, restitution payment, or day of community service, can make up for these violations at a later date to complete probation. At the same time, the objectives of his or her probation, whatever they may be, might still be satisfied despite the mishap.

Joshua R. DeGonia, *Defining a Successful Completion of Probation Under California's Expungement Statute*, 24 WHITTIER L. REV 1077, 1091 (2003). Moreover, a student who fails the tenth grade, but graduates from high school is surely thought of as successfully completing high school. These examples clearly show the flaw in the People's argument and the court of appeals reasoning that a probation violation is evidence in itself of a defendant not successfully completing all conditions of probation.

Here, Appellant's Probation Officer petitioned the Livingston County Circuit Court to discharge Appellant from probation based on the fact that "Defendant has complied with t[he] conditions of probation. Defendant reported as directed. All fees and costs are paid in full. Per a recent LEIN, ther[e] are no pending charges or outstanding [w]arrants." Ex. 2. Based on this recommendation, the Court ordered that Appellant be discharged from probation. Thus, as in this case, there is a logical connection between a successful completion of probation and a discharge based on a recommendation stating such.

C. The Felon in Possession of a Firearm statute focuses on the criminal status of the possessor of a firearm.

The intent of the statute is to keep guns out of the hands of those "who have exhibited their disregard for ordered society and pose a threat to public safety." *People v Dillard*, 246 Mich App 163, 170, 631 NW2d 755 (2001) (quoting *People v Swint*, 225

Mich App 656, 662, 562 NW2d 272 (1997)). Those who have exhibited this disregard and “firearms are a lethal combination—at least for three to five years after a felon successfully completes his term of incarceration and probation and pays all requisite fines.” *Id.* (emphasis added). The statute focuses on the criminal status of the possessor of a firearm. *See id.* Someone who has not been discharged from probation for failure to complete all conditions, someone who has not paid all fines and costs, and someone who has not served all terms of imprisonment does show a disregard for societal norms and poses a threat to public safety and, therefore, does not have the right to possess firearms under the statute. However, someone who has been successfully discharged from probation, has paid all fines and costs, served all terms of imprisonment, *and* waited three to five years to possess a firearm is a person who is exhibiting a respect for societal norms and order and, therefore, gains back the right to possess firearms. It is evident that the Legislature’s intent was not to keep firearms out of a defendant’s hands permanently. It is evident that the Legislature intended to offer an opportunity for a defendant to *earn* back this right. Appellant has done just that.

D. Appellant’s successful discharge from probation satisfies the successful completion as required by the Felon in Possession of a Firearm statute.

Here, Appellant was successfully discharged from probation. While it is true that Appellant pled guilty to a violation of probation, probation was continued, and he did not forfeit the possibility of a full discharge. *See generally Wayne Co Prosecutor, supra* at 157. And as indicated on the Petition and Order for Discharge from Probation, “Defendant has complied with teh [sic] terms and conditions of probation.” Ex. 2. Based on this petition, the judge signed the

Order of Probation Discharge. Ex. 2 This Order of Probation Discharge symbolizes that Appellant faithfully performed all of the conditions and obligations of his probation. *See generally* MCL 791.242; *Wayne Co Prosecutor, supra*. This is quintessential *successful completion* of all conditions of probation.

2. Under Michigan’s felon in possession of a firearm statute, which prohibits a person convicted of a felony to possess a firearm unless the person “successfully completes all terms and conditions” of probation, are the words “successful” and “completed” vague and ambiguous, when the defendant was discharged from probation based on a petition that states the person has complied with the terms of probation; the defendant demonstrates a willingness to follow the statute by waiting the requisite number of years; and members of the court of appeals disagree with the meaning of the statute.

It was Appellant’s original argument that the statutory language was straightforward and clear because it seemed obvious that the term *successful* would be used by the courts and prosecution in its ordinary and generally accepted meanings. It is interesting to note that the majority opinion of the court of appeals never addresses the meaning of the word *successful*. And as the dissent noted, the majority “present [ed] a plausible construction. *Sessions, supra*. However, the problem with a “plausible construction” and not an interpretation of the actual words of the statute highlights the issue that the term “*successful*” is not as straightforward and clear as previously thought. If a panel of the court of appeals can be as divided on the meaning of the statute, then it can be easily seen that a defendant may not have fair notice that his conduct was prohibited by the statute.

A statute is presumed constitutional. *People v Sands*, 261 Mich App 158, 680 NW2d 500 (2004). The burden is on the party challenging the constitutionality of a statute. *Id.* Judicial interpretation is permitted when the language is ambiguous. *People v Tombs*, 260 Mich App

201, 679 NW2d 77 (2003) (citation omitted). Language is ambiguous when it has more than one commonly accepted meaning. *Id.* at 209, 679 NW2d at 82. When “common words [are] used in their ordinary fashion [and] lead to one reasonable interpretation, a statute cannot be found ambiguous.” *Id.*

As noted previously, the term “successful” means succeeds, and succeeds means (1) to turn out well, or (2) to attain a desired object or end. *Merriam-Webster’s Collegiate Dictionary*, *supra*. And the term “complete” means (1) filled up; with no part or element lacking; free from deficiency; entire; perfect; consummate; (2) finished; ended; concluded; completed; as, the edifice is complete; and (3) having all the parts or organs which belong to it or to the typical form; having calyx, corolla, stamens, and pistil. *Webster’s Revised Unabridged Dictionary* (1996). According to the court of appeals in its opinion, successful completion means the same as “complied with.” And as applied to this case, successful completion could mean, to Appellant, that he is discharged from probation. The court of appeals apparently determined that completes means “complies perfectly.” Whereas Appellant and Judge Bandstra, apparently from his dissenting opinion, find the term complete to mean finished, ended, or concluded.

The Court should take into account the legislative intent behind the statute and try to reconcile the ambiguity in favor of the purpose that the statute was intended. The court of appeals noted that the legislative intent was to keep firearms out of a felon’s hands, specifically, a “felon who has exhibited a disregard for ordered society and posed a threat to public safety.” *Sessions*, *supra*. However, as the dissent noted, the legislative intent does not help reconcile the ambiguity in the felon in possession of a firearm statute because the Legislature did not make a permanent prohibition against felons possessing firearms. And anyone who has broken a law

can be considered to have exhibited a disregard for ordered society and be a threat to public safety.

Instead, the Legislature provided an opportunity for convicted felons to earn back this civil liberty. The question, therefore, is when the Legislature intended for a person to earn back the liberty to possess firearms, which brings back the ambiguous phrase “successful completion.” As noted by Judge Bandstra, his interpretation of the timing is “when probation has been completed . . . without any regard to any prior failure to comply with conditions imposed during the probationary period.” *Sessions*, supra. This interpretation fits better with the statutory language as a whole.

In addition, the court of appeals and the People’s interpretations of the phrase “successful completion” make the statute unconstitutionally vague. It is well established that “a penal statute may be unconstitutionally vague if it . . . fails to provide fair notice of the conduct proscribed.” *Sands*, supra at 161, 680 NW2d at 502 (citing *People v Boomer*, 250 Mich App 534, 655 NW2d 255 (2002)). A statute “must give a person of ordinary intelligence a reasonable opportunity to know what is prohibited.” *Id.* And a statute must use terms “that require persons of ordinary intelligence to speculate regarding its meaning and differ about its application.” *Id.* Finally, a statute’s “meaning must be fairly ascertainable by reference to judicial interpretations, the common law, dictionaries, treatises, or the commonly accepted meanings of words.” *Id.*

When reading the statute, the interpretation of successful completion of probation is plainly understood as finishing or ending probation. In this case, Appellant was discharged based on a petition that states that he had complied with all of the terms and conditions of

probation. If, as the court of appeals suggests, “completed” means “complied” with, but Appellant was found not to have “completed” or “complied” with, then the statute is vague. It is obvious that the probation officer did not understand “complied” with to mean the same thing as the court of appeals because she requested that Appellant be discharged based on the fact that he complied with the terms and conditions. And the district court judge who dismissed the charge and the circuit court judge who affirmed that decision did not have the same understanding as the court of appeals because they agreed with the Appellant and probation officer. And even among the members of the panel there was a disagreement as to the meaning of the words.

Criminal statutes should be strictly construed in favor of lenity. *People v Gilbert*, 414 Mich 191, 211, 324 NW2d 834 (1982). Any ambiguity should be resolved in the favor of lenity. *Id.* All doubts should be resolved in favor of the accused, and the court should be concerned with enforcing a harsher penalty than was expected by the Legislature. *Id.* In this case, the clearest interpretation of successful completion is to leave it at completion and not substitute the word compliance.

CONCLUSION

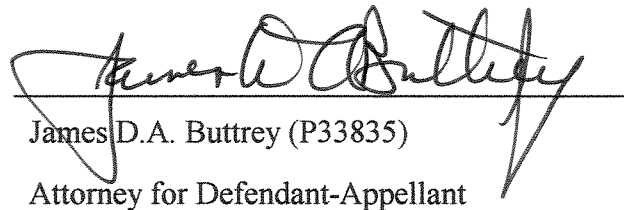
The language in the Felon in Possession of a Firearm statute appears, at first glance, to be clear and unambiguous. However, it is obvious that there are several interpretations and meanings that can be attributed to the statutory language. The most reasonable and clear interpretation of the statute is that it requires successful completion of all conditions of probation. Successful completion of all conditions of probation is achieved when a discharge is obtained based on the faithful performance of all of the conditions and obligations of his

probation. An Order for Discharge of Probation is obtained based on such performance evidences a successful completion of all conditions of probation. Appellant has successfully completed all conditions of probation, as well as completing all other requirements of the statute, and therefore, was in lawful possession of the firearm.

RELIEF REQUESTED

Appellant requests that this Court reverse the court of appeals decision and affirm the circuit court's decision dismissing Count 1.

Respectfully submitted,



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